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# In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. 26

JOHN BURRELL GARNER, ET AL., PETITIONERS

v.

STATE OF LOUISIANA

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No. 27

MARY BRISCOE, ET AL., PETITIONERS

v.

STATE OF LOUISIANA

---

No. 28

JANNETTE HOSTON, ET AL., PETITIONERS

v.

STATE OF LOUISIANA

---

ON WRITS OF CERTIORARI TO THE SUPREME COURT  
OF LOUISIANA

---

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## OPINIONS BELOW

The opinions of the Supreme Court of Louisiana in *Garner* (G. 53<sup>1</sup>), *Briscoe* (B. 55), and *Hoston* (H. 55-56) and of the Nineteenth Judicial District Court of Louisiana in each of these cases (G. 37; B. 38-39; H. 38-39) are not officially reported.

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<sup>1</sup> The records in *Garner v. Louisiana*, No. 26, *Briscoe v. Louisiana*, No. 27, and *Hoston v. Louisiana*, No. 28, are referred to as "G.", "B.", and "H.", respectively.

**JURISDICTION**

The judgment of the Supreme Court of Louisiana in *Garner* was entered on October 5, 1960 (G. 53), in *Briscoe*, on October 5, 1960 (B. 56), and in *Hoston*, on October 5, 1960 (H. 55). The petitions for writs of certiorari were granted on March 20, 1961 (365 U.S. 840; G. 56; B. 62; H. 58). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

Petitioners, who are Negroes, were convicted by a Louisiana state court of disturbance of the peace for having sat at lunch counters reserved for whites. The questions presented and discussed in this brief are:

1. Whether petitioners' convictions violated the due process clause of the Fourteenth Amendment because they are utterly unsupported by evidence proving essential elements of the offense.

2. Whether the due process clause of the Fourteenth Amendment was violated by petitioners' conviction under a statute which, if applied to these circumstances, is so vague and indefinite that it fails to give fair notice of the conduct proscribed.

3. Whether, in the circumstances of this case, petitioners' arrest and conviction violated the equal protection clause of the Fourteenth Amendment because the State was enforcing a government policy of racial segregation.

4. Whether in *Briscoe v. Louisiana*, No. 27, petitioners' arrest and conviction deprived them of their rights under the Interstate Commerce Act to service

on a non-discriminatory basis in a restaurant in a bus terminal operated as part of interstate commerce.

Petitioners also raise additional questions which we believe this Court need not reach (see *infra*, pp. 16-17) and which we therefore have not discussed in this brief:

1. Whether any arrest by state police and conviction by a State court of Negroes who enter and refuse to leave private restaurants customarily open to all members of the public except Negroes constitutes state action violating the equal protection clause of the Fourteenth Amendment.

2. Whether any arrest and conviction of Negroes who enter and refuse to leave such restaurants deprives them of their freedom of expression as protected by the due process clause of the Fourteenth Amendment.

#### **INTEREST OF THE UNITED STATES**

These cases involve racial discrimination and denial of constitutional rights. While it is unnecessary here to reach the constitutional problems common to the so-called "sit-ins" generally, the convictions in these cases arose in the context of a movement which is significant through much of the country. Numerous citizens have participated in this movement, and many have been arrested and convicted by state authorities in circumstances similar to those involved in the cases now before the Court. The United States is, of course, deeply concerned when many of its citizens are arrested and convicted of crime without due process of law and in a manner which denies to them the equal protection of the laws, as guaranteed by

the Fourteenth Amendment. This concern is accentuated when questions of widespread public interest and significance are involved. Beyond that, the government believes that it may be able to assist the Court by focusing upon issues which are dispositive without involving broader and largely uncharted questions concerning the meaning of "State action." It is because of these considerations that the United States deems it appropriate to participate as *amicus curiae*.

#### STATEMENT

*Garner v. Louisiana*, No. 26.—On March 29, 1960, petitioners, two Negro students at Southern University, took seats at the lunch counter in Sitman's Drug Store, Baton Rouge, Louisiana (G. 30). One of the petitioners ordered coffee but was advised by the proprietor of the drug store that he could not be served (G. 30). Although Negroes may buy other goods in the drug section of Sitman's Drug Store at the same counters as whites, there are no facilities for serving food to Negro customers (G. 31-32). Within ten minutes after petitioners had sat down at the counter police officers arrived (G. 30). They were not called by the owner of the store or any of his employees, and the owner did not know who called the police (G. 30-31). Instead, the arresting officers—Major Bauer and Captain Weiner—were summoned by the police officer on his "beat" near the store because he noticed the two Negroes sitting at the lunch counter (G. 34). The owner of the store received no complaints from customers regarding the presence of the two Negroes

at the lunch counter (G. 33), and no other complaint was made to the police department (G. 34-35).

When the police officers arrived at the drug store, Major Bauer approached the students, told them that they were violating the law, and asked them to leave (G. 34). One of the students told the officers that he had purchased an umbrella in the drug store and did not understand why he could not sit at the lunch counter (G. 34). When the students did not leave, the police placed them under arrest, pursuant to L.S.A.-R.S. 14:103(7), for having disturbed the peace, and took them to police headquarters (G. 34-35). Captain Weiner, one of the arresting officers, explained the arrests at petitioners' trial as follows (G. 35):

\* \* \* the law says that this place was reserved for white people and only white people can sit there and that was the reason they were arrested.

\*       \*       \*       \*

The fact that they were sitting there and in my opinion were disturbing the peace by their mere presence of being there I think was a violation of Act 103.

He similarly said that "[t]he mere presence of these negro defendants sitting at this cafe counter seat reserved for white folks was violating the law \* \* \*" (G. 36).

Informations were filed against petitioners which charged that they had violated L.S.A.-R.S. 14:103(7) by refusing "to move from a cafe counter seat at

Sitman's Drug Store \* \* \*, after having been ordered to do so by the agent of Sitman's Drug Store \* \* \*"  
(G. 1).'

After the trial, the trial judge rendered an oral opinion in which he found petitioners guilty of having violated L.S.A.-R.S. 14:103(7) and stated (G. 37):

\* \* \* the evidence put on by the State [was] that these two accused were in this place of business \* \* \* and they were seated at the lunch counter in a bay where food was served and they were not served while there, and officers were called and after the officers arrived they informed these two accused that they would have to leave, and they refused to leave.  
\* \* \* The Court is convinced beyond a reasonable doubt of the guilt of the accused from the evidence produced by the State, for the reason that in the opinion of the Court, the action and conduct of these two defendants on this occasion at that time and place was an act done in a manner calculated to, and actually did, unreasonably disturb and alarm the public.  
\* \* \*

Petitioners were convicted and sentenced to imprisonment for four months, three months of which would be suspended upon the payment of a fine of \$100.00 (G. 37-38, 41). Applications for writs of certiorari, mandamus, and prohibition were filed in the Supreme Court of Louisiana (G. 44-46), but the applications were denied on the ground that the court was without jurisdiction to review the facts in criminal cases

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\* The informations in all three cases identified each petitioner as "CM," i.e., colored male, or "CF," colored female (G. 2; B. 2; H. 2).

and the rulings of the district judge on matters of law were not erroneous (G. 53).

*Briscoe v. Louisiana*, No. 27.—On March 29, 1960, petitioners, seven Negro students at Southern University, took seats at the lunch counter at the restaurant in the Baton Rouge Greyhound Bus Terminal (B. 30, 34). They attempted to order food but were told by the waitress that "colored people are supposed to be on the other side" and that the "seats where they were seated are reserved for white people" (B. 30-31). The waitress testified that she had no reason for making these statements to petitioners other than that they were Negroes (B. 31), and that petitioners, besides ordering food, "hadn't done anything other than sit in those seats \* \* \* reserved for whites" (B. 32). The only posted sign read "Refuse service to anyone" (B. 32). Negroes could be served in another part of the bus station in an area reserved for them (B. 30-31, 32, 33-34).

A bus driver who was sitting at a booth near the lunch counter telephoned the police "that there were several colored people sitting at the lunch counter" (B. 33, 34).<sup>1</sup> Captain Weiner, one of the arresting officers, explained that the police "were called because of the fact that [petitioners] were sitting in a section reserved for white people" (B. 35). After the police asked petitioners to move and they had refused, petitioners were arrested for disturbing the peace (B.

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<sup>1</sup> A police officer testified that the desk sergeant was called by "some woman at the Greyhound Bus Station" (B. 34). This hearsay statement was apparently erroneous since the waitress at the restaurant stated unequivocally that one of several bus drivers in the restaurant called (B. 33).

35). Captain Weiner testified that petitioners were arrested because "according to the law, in my opinion, they were disturbing the peace." \* \* \* The fact that their presence was there in the section reserved for white people, I felt that they were disturbing the peace of the community" (B. 36). Captain Weiner further emphasized that the basis of the charges against petitioners that they were disturbing the peace was "the mere presence of their being there" (B. 36).

Informations were filed against petitioners which charged that they had violated L.S.A.-R.S. 14:103 (7) by refusing "to move from a cafe counter seat at Greyhound Restaurant after having been ordered to do so by the agent of Greyhound Restaurant \* \* \*" (B. 1). In his oral opinion, the trial judge found petitioners guilty of having violated L.S.A.-R.S. 14:103 (7), and stated (B. 38-39):

\* \* \* it is the decision of the Court that they are guilty as charged for the reason that from the evidence in this case their actions in sitting on stools in this place of business when they were requested to leave and they refused to leave; the officers were called, the officers requested them to leave and they still refused to leave, their actions in that regard in the opinion of the Court was an act on their part as would unreasonably disturb and alarm the public.

Petitioners received the same sentences as the petitioners in *Gerner* (B. 43-44), and petitioners' post-conviction applications in the Louisiana Supreme Court were denied for the same reason as in the *Gerner* case (B. 46-49, 56).

*Hoston v. Louisiana*, No. 28.—On March 28, 1960, petitioners, seven Negro students at Southern University, took seats at the lunch counter at the S. H. Kress Company store in Baton Rouge (H. 28-29). They were not refused service or asked to move (H. 32-33). Rather, they were simply not served and were "advised" by a waitress that they could be served at another counter in the Kress store where, "by custom," Negroes were served (H. 29, 32-34). Except for the lunch counter, Negroes and whites may make purchases in Kress at all counters (H. 31, 32). There are no signs indicating that the lunch counters are segregated but petitioners were expected to have known this "[b]y custom and by noticing that the colored people were being served at the counter across the store" (H. 32). Although the students did not move, the manager took no immediate action but continued eating his lunch at the counter (H. 29-30). After finishing his meal, he telephoned "the police department that [petitioners] were seated at the counter reserved for whites" (H. 30). The manager testified at petitioners' trial that he called the police because he "feared that some disturbance might occur" (H. 30). The manager also testified that the only conduct of petitioners he considered to be a disturbance of the peace was their presence at the lunch counter (H. 33).

The police, after arriving at the store, asked petitioners to leave since "they were disturbing the peace" (H. 36). When petitioners refused, they were arrested, as one of the arresting officers testified, for

disturbing the peace "[b]y sitting there" "because that place was reserved for white people" (H. 37).

Informations were filed against petitioners which charged that they had violated L.S.A.-R.S. 14:103(7) by refusing "to move from a cafe counter seat at Kress' Store \* \* \* after having been ordered to do so by the agent of Kress' Store \* \* \*" (H. 1). The trial judge, in his oral opinion, found (H. 39):

\* \* \* [petitioners] took seats at the lunch counter which by custom had been reserved for white people only. They were advised by an employee of that store, or by the manager, that they would be served over at the other counter which was reserved for colored people. They did not accept that invitation; they remained seated at the counter which by custom had been reserved for white people. \* \* \* the action of these accused on this occasion was a violation of Louisiana Revised Statutes, Title 14, Section 103, Article 7, in that the act in itself, their sitting there and refusing to leave when requested to, was an act which foreseeably could alarm and disturb the public, and therefore was a violation of the Statute that I have just mentioned.

Petitioners were given the same sentences as the petitioners in the *Garner* and *Briscoe* cases (H. 43-44) and petitioners' post-conviction applications to the Louisiana Supreme Court were denied for the same reasons as in those cases (H. 46-49, 55-56).

## SUMMARY OF ARGUMENT

## I

Petitioners' convictions for disturbance of the peace violate the due process clause of the Fourteenth Amendment because there was no evidence tending to prove essential elements of the only offense charged. The informations did not charge the only offense which even conceivably was proved.

A. Since there is no evidence tending to support the convictions under L.S.A.-R.S. 14:103, the convictions violate due process. *Thompson v. City of Louisville*, 362 U.S. 199. This statute requires proof of three basic elements: (1) The accused must commit an act of the kind proscribed; (2) the acts must be done "in such a manner as would foreseeably disturb or alarm the public"; and (3) there must be actual public alarm or disturbance.

1. Petitioners clearly did not commit any acts of the kind proscribed by Louisiana's disturbance of the peace statute. Earlier decisions of the Louisiana Supreme Court make clear that disturbance of the peace includes only violent, loud, or boisterous conduct. *Town of Ponchatoula v. Bates*, 173 La. 823, 138 So. 851 *State v. Sanford*, 203 La. 961, 14 So. 2d 778. This construction is supported, and indeed virtually compelled, by Section 103 itself, for all its specific prohibitions involve such conduct. The records in these cases show that petitioners' acts were

completely peaceful; they merely sat quietly at a counter normally reserved for whites.

2. There is also no evidence tending to prove that petitioners acted "in such a manner as would foreseeably disturb or alarm the public." This requirement is explicitly stated in Section 103 in its introductory language applicable to all seven subdivisions. Petitioners, however, acted peacefully; the restaurant employees merely refused to serve them and indicated that petitioners were sitting at counters reserved for whites. There was nothing in the reaction of these employees or of customers or bystanders even suggesting that petitioners' presence would cause a disturbance. And the police arrested petitioners, not because of the likelihood of a disturbance, but for the sole reason that they were sitting in the wrong place. The only possible basis for the trial court's findings of a foreseeable disturbance is judicial notice, but courts do not take judicial notice of debatable facts, particularly when, as here, they are contradicted by the evidence.

3. There is not the slightest evidence that petitioners' conduct in fact disturbed or alarmed the public. Subsection 7 of the statute, under which petitioners were convicted, is a loose, catch-all provision prohibiting acts committed "in such a manner as to unreasonably disturb or alarm the public." Thus, subsection 7 requires proof of actual alarm or disturbance caused by petitioners' acts. Any other interpretation would render this language redundant with the requirement which applies to all of Section 103—that the conduct foreseeably alarm or

disturb the public. And, furthermore, the history of Section 103 strongly indicates that subsection 7 was intended to be confined to actual disturbances.

B. If the evidence in these cases proves any offense, it is an offense which the informations did not charge. The real thrust of the prosecutions—as both the informations and oral opinions show—is an effort to punish petitioners for criminal trespass. The Louisiana Supreme Court has held that Louisiana's criminal trespass law applies to persons who enter land lawfully, but refuse to leave when ordered to do so by the proprietor. *State v. Martin*, 199 La. 39, 5 So. 2d 377. Here, however, there is no evidence that petitioners were asked to leave. But, in any event, petitioners were charged only with disturbing the peace, not trespass. And this Court has held that it violates due process to convict a defendant of a crime with which he was not charged. *Cole v. Arkansas*, 333 U.S. 196.

## II

The statute under which petitioners were convicted is, if applied to petitioners, so vague and uncertain as to violate due process.

Due process requires that a State statute give fair notice of what conduct is criminal. This requirement should be construed with particular strictness in a case involving, at the least, the possibility that the State is using the statute to promote racial discrimination. The Louisiana disturbance of the peace statute—particularly as interpreted by the Louisiana Supreme Court to apply only to non-peaceful con-

duct (*State v. Sanford, supra*)—does not give the slightest indication that it applies to sitting quietly at a lunch counter which is reserved for persons of another race where there is no disturbance nor reason to foresee a disturbance. If the statute applies to these facts, it can be used to convict anyone for any conduct that local officials, acting *ad hoc*, find distasteful.

### III

Petitioners' arrest and conviction were the result of State, not privately, imposed racial discrimination and therefore violate the equal protection clause of the Fourteenth Amendment. The State was not merely allowing a private person to carry out private discrimination on his own property or even enforcing such discrimination. Acting through local police and judicial authority, the State was imposing a policy of its own.

A. The records show that petitioners were arrested because of their mere presence at the lunch counters. The police made the arrests not on the request of the managers or employees of the lunch counters but merely because petitioners were Negroes sitting in areas normally reserved for whites.

B. Petitioners' convictions were also based on their race. The only grounds on which the trial court could have found three essential elements of the offense are judicial notice or a ruling that the presence or absence of these elements constituted a question of law. Thus, the trial court must have determined that public alarm or disturbance was foreseeable, that such alarm or disturbance actually occurred, and that peti-

tioners' acts were unreasonable, by concluding that those elements are 'automatically satisfied whenever there is racial integration in public places.

C. This Court has made clear that, if a State statute which is nondiscriminatory on its face is applied in a discriminatory way, this constitutes a violation of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356. Such unconstitutional discrimination of course occurs whenever enforcement of the law is based on race. State action which promotes a State policy of segregation and therefore violates rights protected by the Constitution cannot be saved by using the label "disturbance of the peace."

#### IV

In *Briscoe v. Louisiana*, petitioners' arrest and conviction violated their rights under the Interstate Commerce Act.

A. In *Boynton v. Virginia*, 364 U.S. 454, 463-464, the Court held that the Act forbids racial discrimination against interstate passengers in restaurants operated "as an integral part of the bus carrier's transportation service for interstate passengers." Although petitioners were not interstate passengers, the Act forbids interstate carriers to discriminate against "any particular person." The record shows that the lunch counter in *Briscoe* was located in the Greyhound Restaurant in the Greyhound bus terminal. It can fairly be inferred, in the absence of any contrary evidence, that the lunch counter is operated as an integral part of interstate commerce.

B. Although petitioners have not presented this issue either to this Court or the Louisiana courts, the Court can properly consider it. If the *Briscoe* case cannot be decided, contrary to our contentions, on the basis of the same constitutional issue as the other two instant cases, consideration of this statutory issue would relieve the Court from considering further constitutional questions. It is of course a basic principle that the Court refuses to adjudicate constitutional issues unless such an adjudication is absolutely necessary to the decision. The parties cannot nullify this principle simply by failing to raise the statutory issue. See *United States v. C.I.O.*, 335 U.S. 106, 110.

#### ARGUMENT

Petitioners, who are Negroes, were arrested by state officers and convicted by State courts of having disturbed the peace by entering and remaining at lunch counters that are reserved for whites. Petitioners argue that (1) the State was enforcing a custom of private racial discrimination in restaurants, which constitutes state action in violation of the equal protection clause of the Fourteenth Amendment (see Pet. Br. 18-24), and (2) the State was interfering with freedom of expression in places open to the public in violation of the due process clause of the Fourteenth Amendment (cf. *Marsh v. Alabama*, 326 U.S. 501) (see Pet. Br. 36-38). These issues are of great national importance, since if petitioners were successful in either their two principal contentions, this would probably be decisive of most of the numer-

ous "sit-in" cases now pending in State courts (see, e.g., Pet. in *Garner*, p. 28). Thus, resolution of these issues might have important effect on the "sit-in" movement which has reached considerable importance virtually throughout the country. On the other hand, these contentions raise broad and, we believe, difficult constitutional problems.

In our view all of petitioners' convictions are invalid on three narrower grounds: (1) the State failed to present any evidence whatsoever to support essential elements of the offenses as defined by State law in violation of the due process clause of the Fourteenth Amendment (see *infra*, pp. 18-33); (2) the Louisiana statute under which petitioners were convicted was so vague and uncertain, as applied to the facts of these cases, as to violate the due process clause of the Fourteenth Amendment (see *infra*, pp. 33-38); and (3) the State, in these particular cases, was itself imposing racial discrimination, not merely enforcing a private landowner's decision, in violation of the equal protection clause of the Fourteenth Amendment (see *infra*, pp. 38-46).<sup>4</sup> Although the issues raised by these propositions are constitutional, they are not only narrower but also, we believe, more easily resolved than the other constitutional issues raised by petitioners. Accordingly we do not discuss the broader questions.

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<sup>4</sup> In addition, we believe that the convictions in *Briscoe* are invalid because they violate the Interstate Commerce Act (see *infra*, pp. 46-51).

## I

THE CONVICTIONS VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE WAS NO EVIDENCE TENDING TO PROVE ESSENTIAL ELEMENTS OF THE ONLY OFFENSE CHARGED AND NO CHARGE OF ANY OFFENSE PROVED

A. THERE WAS NO EVIDENCE TENDING TO PROVE THAT PETITIONERS VIOLATED L.S.A.-R.S. 14:103(7) AS CHARGED IN THE INFORMATIONS.

In *Thompson v. City of Louisville*, 362 U.S. 199, 204, 206, this Court held that a conviction in a State court must be set aside under the Fourteenth Amendment "if there is no support for these convictions," or "[t]he record is entirely lacking in evidence to support any of the charges," or is "without evidence of his guilt." Cf. *Konigsberg v. State Bar*, 353 U.S. 252; *Schwartz v. Board of Bar Examiners*, 353 U.S. 232; *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106. The decision does not mean that a federal court may reverse a State conviction merely because, upon re-evaluating the record, it finds that the evidence is insufficient to support the conviction. The conviction violates due process, however, if there is *no evidence at all* tending to prove one or more of the essential elements of the offense.

The arrest, arraignment, and conviction of each of the petitioners were specifically based upon subsection 7 of the Louisiana statute punishing disturbance of the peace. L.S.A.-R.S. 14:103(7). The statute provides:

Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:

- (1) Engaging in a fistie encounter; or
- (2) Using of any unnecessarily loud, offensive, or insulting language; or
- (3) Appearing in an intoxicated condition;  
or
- (4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or
- (5) Holding of an unlawful assembly; or
- (6) Interruption of any lawful assembly of people; or
- (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.

To support a conviction under this statute there must, as we shall show below, be proof of three basic elements of the offense:

- (1) The accused must commit an act of the kind proscribed by the statute;
- (2) The acts must be done "in such a manner as would foreseeably disturb or alarm the public";
- (3) If the charge is under subdivision 7, there must be actual public alarm or disturbance.

The cases come here upon the evidence taken and the findings made in the trial court, for the Supreme Court of Louisiana refused to review the evidence upon the ground that it was "without jurisdiction to review facts in criminal cases" (G. 53; B. 56; H. 56). In none of the three cases was there any evidence to prove any of the three indispensable elements of the offense defined by the statute. In some instances the trial court did not even make a finding upon an essen-

tial element. Therefore, the convictions should be set aside upon the authority of *Thompson v. City of Louisville*.

1. *Petitioners did not commit any acts of the kind proscribed by L.S.A.-R.S. 14:103*

L.S.A.-R.S. 14:103 proscribes six specific acts which constitute a breach of the peace when done in a manner which would foreseeably disturb or alarm the public. Subsection 7 then forbids "[c]ommission of any other act in such a manner as to unreasonably disturb or alarm the public." Admittedly, petitioners engaged in none of the conduct described in the first six subsections. They were charged specifically with violation of subsection 7, an earlier version of which the Supreme Court of Louisiana aptly described as "the general portion of the statute which does not define the 'conduct or acts' the members of the Legislature had in mind" (*State v. Sanford*, 203 La. 961, 967, 14 So. 2d 778).

The State decisions giving content to the general words make it plain that subsection 7 does not embrace peaceful conduct such as that of petitioners. In *Town of Pouchatoula v. Bates*, 173 La. 823, 138 So. 851, the Louisiana Supreme Court held under an ordinance simply prohibiting disturbance of peace that a disturbance of the peace is "any act or conduct of a person which molests the inhabitants in the enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes excitement, unrest, disquietude, or fear among persons of ordinary normal tempera-

ment." (173 La. at 828). A challenge to rooted customs may cause intellectual unrest or emotional excitement, but it is plain that the court's definition of a breach of the peace uses these words to encompass only conduct which is violent, loud, or boisterous, or which is provocative in the sense that it induces a physical disturbance such as fighting, riot or tumult, or which arouses the fear of these disturbances among persons of normal temperament. A later decision makes this plain. In *State v. Sanford*, 303 La. 961, 14 So. 2d 778, the evidence showed that thirty Jehovah's Witnesses approached a Louisiana town for the purpose of distributing religious tracts and persuading the public to make contributions to their cause. The Witnesses were warned by the Mayor and police officers that "their presence and activities would cause trouble among the population and asked them to stay away from the town \* \* \*" (203 La at 964). The trial court found that the Witnesses entering the town and stopping passers-by in the crowded main street under these circumstances "might or would tend to incite rioting and disorderly conduct" (*id.* at 965). The Supreme Court of Louisiana set aside convictions for breach of the peace, thus holding in effect that the defendants were not pursuing a "disorderly course of conduct which would tend to disturb the peace." Although the language of the statute was subsequently altered, there is nothing in the change or in subsequent court decisions to throw doubt upon this ruling.

Indeed, the conclusion that L.S.A.-R.S. 14: 103(7) does not reach peaceful and orderly conduct is virtu-

ally compelled by reading the statute as a whole. The first six subsections deal with violence or loud boisterous conduct. The only possible exceptions are (i) the use of insulting language, which in this context plainly refers to insults calculated to provoke violence, and (ii) the holding of an unlawful assembly, which is also likely to result in the outbreak of violence. The catch-all language in subsection 7 would normally be interpreted in the light of the preceding subsections as an effort to cover other forms of violence or loud and boisterous conduct not already listed.

It is also apparent that the Louisiana legislature doubted whether L.S.A.-R.S. 14:103(7) covered petitioners' acts. Immediately after the events for which petitioners are being prosecuted, the legislature rewrote the statute and added a definition of acts which may cover the present case (L.S.A.-R.S. 14:103.1 (1980 Supp.)):

A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(4) refuses to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace.

The contrast between this language and the statute under which petitioners were accused confirms the interpretation flowing from the judicial precedents and the natural meaning of the words.

In these cases, there can be no doubt that petitioners' acts were peaceful. They merely sat down quietly at counters reserved for whites. Such conduct is clearly not of the kind proscribed in Louisiana as disturbance of the peace.

2. *There was no evidence tending to prove that petitioners acted "in such a manner as would foreseeably disturb or alarm the public"*

Even if petitioners committed acts of the kind embraced by the statute, they could not be convicted without proof that the acts were done, "in such a manner as would foreseeably disturb or alarm the public." L.S.A.-R.S. 14:103 sets out this element of the offense in the introductory language applicable to all seven divisions.

Although the trial court found that petitioners' conduct was calculated to alarm and disturb the public (G. 37; B. 39; H. 39), there was an absolute lack of evidence to support the finding. Petitioners sat down quietly at a lunch counter normally reserved for whites. In *Gerner* they were told that they could not be served because they were Negroes, but they were not even asked to move. They remained there quietly until ten minutes later when the police arrested them (G. 30-32). In *Briscoe*, the waitress told them that "colored people are supposed to be on the other side," and declined to serve them (B. 30-31). They remained quietly in their seats until they were arrested upon the arrival of the police. In *Hoston* they were told by the waitress that they could be served at another counter. They were not asked to leave and

stayed where they were until once again the police made the arrests (H. 29, 32-34). There was nothing in this conduct which could conceivably "disturb or alarm the public."

Admittedly, petitioners did not engage in violence or any other loud or tumultuous conduct. There is nothing in sitting quietly at a lunch counter, even though one knows that he may not be welcome, which can be said by its very nature to give him warning of public alarm. Petitioners made no speeches. They did not even speak to anyone except to order food. They carried no placards, and did nothing, beyond their presence, to attract attention to themselves or others.

There is nothing in the reaction of the manager or waitresses or in the conduct of customers or bystanders to suggest that petitioners' presence would cause a public disturbance. Negroes were welcome in all three establishments. The arresting officers testified that petitioners' sole offense was that they, being Negroes, sat in a section reserved for whites (G. 35-36; B. 35-36; H. 37). In the *Garner* case neither the owner of the drug store nor any bystanders thought it necessary to call the police. The arrests were made because a policeman near the store saw that Negroes were sitting at the white lunch counter. (G. 30-31, 34). He gave no testimony of an actual disturbance nor did he say that there was a reason for fearing a breach of the peace. In *Briscoe*, the waitress testified that petitioners "hadn't done anything other than sit in these seats \* \* \* reserved for whites" (B. 32). In *Hoston* the manager did testify that he "feared

that some disturbance might occur" (H. 30), but he was so little concerned that he continued to sit at the same lunch counter eating his lunch and waited until he was finished to call the police. The manager also acknowledged that the only conduct which he considered disturbing was the petitioners' mere presence at the counter (H. 29-30, 33). He gave no reasons for his concern and did not say what he meant by a "disturbance." Under these circumstances, the manager's general statement gives "no support" for the convictions, within the meaning of *Thompson v. City of Louisville, supra* (see 362 U.S. at 204).

The police gave no evidence that a public disturbance was to be anticipated. In *Garner*, Captain Weiner, one of the arresting officers, explained that he made the arrests because "the law says that this place was reserved for white people" (G. 35). In *Briscoe*, Captain Weiner said that, "The fact their presence was there in the section reserved for white people, I felt that they were disturbing the peace of the community" (B. 36). Captain Weiner's testimony in *Hoston* was substantially the same (see H. 36-37). Not a single police officer said a word which even remotely implies that fighting, loud words, or any other disorder seemed likely to occur.

It may be argued that the finding that disturbances were a foreseeable result of the mere presence of Negroes at the lunch counter was based on judicial notice derived from general knowledge of the community—perhaps coupled, as the State suggests, with newspaper stories which are not in the record (Brief in Opp., pp. 11-12). But courts can take judicial

notice, especially in criminal cases, only of obvious and incontrovertible facts. *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 301; *United States v. Shaughnessy*, 234 F. 2d 715, 718 (C.A. 2); McCormick, *Evidence*, § 324 (1954). Certainly, it is neither obvious nor incontrovertible, in the present day, that a disturbance may occur merely because Negroes sit peacefully at a lunch counter theretofore reserved for whites. All the facts presented in these cases indicated that no disturbance would occur. The constitutional requirement that a State introduce some evidence of each of the essential elements of a criminal offense before conviction cannot be cast aside through judicial assumptions which are dubious at best and are also contradicted by the evidence in the record.

Of course, it is plain that petitioners' conduct was likely to disturb the sensibilities of those members of the public who hoped for the preservation of racial segregation in restaurants and at lunch counters. It would arouse resentment among the prejudiced. But the decision in *State v. Sanford*, *supra* (203 La. 961, 14 So. 2d 778), makes it clear that L.S.A.-R.S. 14:103 does not reach conduct which merely disturbs or alarms members of the public in this sense of the words.

As stated above, the Jehovah's Witnesses whose convictions were reversed in *State v. Sanford* had been warned by the Mayor and police officers that "their presence and activities would cause trouble among the population and asked \* \* \* to stay away from the town \* \* \*" (203 La. at 964); and the trial court

found that the Witnesses entering the town and stopping passersby in the crowded main street under these circumstances "might or would tend to incite rioting and disorderly conduct" (*id.* at 965). The Supreme Court of Louisiana held that, as a matter of law, this was not "disorderly course of conduct which would tend to disturb the peace." (*id.* at 970).

3. *There was no evidence tending to prove that petitioners' conduct disturbed or alarmed the public*

In the *Briscoe* and *Hoston* cases there was neither evidence nor a finding that petitioners had caused a disturbance. In the *Garner* case the trial court made such a finding (G. 37), but there is not a scintilla of evidence to support it. There was no fighting, no pushing or shoving, no argument nor even loud talk; there were no speeches nor the congregation of an unusual number of people. It was not even shown that the presence of petitioners attracted public attention. If, as we believe, the actual disturbance of some part of the public is a third essential element of the offense defined by L.S.A.-R.S. 14:103(7), then the convictions must be invalidated for an absolute lack of evidence.

Under the first six subsections of L.S.A.-R.S. 14:103, which proscribe specific acts, proof of an actual disturbance is not required. The seventh subsection is a loose catch-all of undefined conduct except as limited by implication, and it would therefore be natural to confine its generality by adding other indicia of misconduct. The language alone is enough to show that this was done by adding the requirement

that the "acts," whatever they might be, be done "in such a manner as to unreasonably disturb or alarm the public." The rest of L.S.A.-R.S. 14:103 shows that these words refer, not to tendency of the acts, but to their actual consequences.

Thus the opening sentence provides that "[d]isturbing the peace is the doing of any of the *following* in such a manner as would foreseeably disturb or alarm the public \* \* \*" (emphasis added). If subsection 7 is construed to cover any act likely to disturb or alarm, it simply repeats the opening sentence. It would certainly be unusual, to say the least, for the legislature to write a statute which prohibits acts which probably will disturb or alarm the public when done "in such a manner as would foreseeably disturb or alarm the public \* \* \*." If this were the intent, the redundancy could easily have been avoided by stating that "[d]isturbing the peace is the doing of any act in such a manner as would foreseeably disturb or alarm the public including \* \* \*"; and then setting out the first six subsections of Section 103. The addition of subsection 7 shows that actually causing disturbance or alarm was intended to be an element of the crime.

Our construction is reinforced by the history of Louisiana's legislation punishing disturbance of the peace. Prior to 1942, the statute specifically prohibited only loud or obscene language, exposing one's person, or using a deadly weapon in a public place, and then provided in a catch-all section that "any person \* \* \* who shall do any other act, in a manner calculated to disturb or alarm the inhabitants \* \* \* or

persons present" would be guilty of a misdemeanor. Act No. 227 of 1934. In 1942, the statute was changed to its present form, which eliminates the last two specific prohibitions mentioned above but adds five other specific prohibitions. Further, the present act requires proof that even acts within the specific prohibitions will foreseeably disturb or alarm the public—a requirement which the 1934 act applied only to the catch-all provision. The language in the catch-all provision itself has been significantly changed from prohibiting "any other act, in a manner calculated to disturb or alarm the inhabitants \* \* \*" to prohibiting "[c]ommission of any other act in such a manner as to unreasonably disturb or alarm the public." It thus appears that the Louisiana legislature in 1942 decided to spell out in more specific prohibitions acts which were previously covered in the catch-all provision. Having specifically prohibited the disturbances of the peace with which it was primarily concerned, the catch-all provision was limited, probably for the reason suggested above, so as to cover only actual disturbances.

Moreover, immediately after the events involved in these cases, the Louisiana legislature passed a disturbance of the peace statute which has significantly different language than the statute involved in this case. That statute (quoted *supra*, p. 22) clearly requires proof that a disturbance was at most foreseeable or likely. The language used in Section 103 is in marked contrast.

Barring any inferences which can be drawn from the decision below, there are no Louisiana cases upon this question. The decision below gives no guidance because there is no opinion, and the court refused to examine the evidence (G. 53; B. 56; H. 56). Under these circumstances this Court should adopt the interpretation which is supported by analysis of the language and history of act and hold that a conviction under subsection 7 requires actual alarm or disturbance. Since there was no evidence of this element of the crime, it furnishes an additional reason for voiding the convictions.

B. IF THE EVIDENCE TENDS TO PROVE ANY OFFENSE, IT IS AN OFFENSE NOT CHARGED. CONVICTION FOR SUCH AN OFFENSE WOULD VIOLATE THE FOURTEENTH AMENDMENT

It seems apparent that the real thrust of the prosecutions was an effort to convict petitioners of criminal trespass, or perhaps to punish them for seeking, in violation of State policy, to eat at lunch counters previously reserved for whites. To impose sentence upon either ground when the information alleged disturbing the peace would violate the Fourteenth Amendment as a conviction upon a charge not made. *Cole v. Arkansas*, 333 U.S. 196. To stretch L.S.A.-R.S. 14:103, which proscribes breach of the peace, so as to cover either of these offenses, even if proper as a matter of State law, is to render it void under the federal Constitution as a vague and indefinite criminal statute which gives no notice of the offense. See Point II, pp. 33-38, *infra*. And of course, a conviction

for violating a State-imposed policy of segregation in public restaurants would be invalid as a denial of equal protection of the law. See Point III, pp. 38-46), *infra*.

The record contains some elements of a criminal trespass under many State laws, but it seems doubtful whether the Louisiana trespass statute is applicable. The closest provision was L.S.A.-R.S. 14:63 which prohibits "[t]he unauthorized and intentional entry upon any: (a) enclosed and posted plot of ground; or \* \* \* (c) structure \* \* \*." In these cases, however, petitioners' initial entry into the structure was authorized since the business invited the trade of Negroes and therefore authorized them to enter. While petitioners were not authorized to enter the portions of the structure reserved for whites, the statute apparently prohibits entry into a portion of a structure only if it is enclosed and posted. None of the lunch counters involved in these cases was enclosed and posted. It does not help the State's case to point out that, despite its language, the Louisiana Supreme Court has held that the statute applies to persons who enter land lawfully, but refuse to leave when ordered to do so by the proprietor. *State v. Martin*, 199 La. 39, 5 So. 2d 377 (1941). In the *Garner* and *Hoston* cases, the owner did not ask petitioners to leave the premises or even to move from the counter (G. 30-33; H. 32-33). In the *Briscoe* case, petitioners were merely told by a waitress that they were seated at a counter reserved for whites and would have to go to another counter to be served

(B. 30-33).<sup>8</sup> In this case, unlike *State v. Martin*, there was no evidence that the proprietor or his agent unequivocally requested any petitioner to leave the premises.<sup>9</sup>

<sup>8</sup>In all three cases, the informations alleged that petitioners refused to leave after being ordered to do so by an agent of the owner (G. 1; B. 1; H. 1). As to the findings, the trial court stated in *Garner* only that the police asked petitioners to leave just before they were arrested (G. 37); in *Briscoe* that they were asked to leave (by whom is not stated) before the police arrived (B. 38-39); in *Hoston* that an employee of the store or the manager advised them "that they would be served over at the other counter" and that they refused to leave when requested (H. 39).

The evidence at trial, however, shows in *Garner* that petitioners were advised that they could not be served, but they were never asked by the proprietor or any employee to leave (G. 30); in *Briscoe*, although the prosecutor's leading questions assume that petitioners were asked to move (B. 31), the witness's testimony directly on this subject was that petitioners were told only that "colored people are supposed to be on the other side" and that the "seats where they were seated are reserved for white people" (B. 30-31); and in *Hoston* the petitioners were not served and were "advised" by a waitress that they could be served at another counter (H. 29, 32-33, 34), but the testimony is explicit that they were never refused service or asked to move (H. 32-33).

<sup>9</sup>Apparently the Louisiana legislature believed that the criminal trespass statute in force during these events did not cover "sit-ins." In 1960 the legislature passed a new criminal trespass statute which reads (L.S.A.-R.S. 14:63.3 (1960 Supp.)):

"No person shall without authority of law go into or upon or remain in or upon any structure \* \* \* which belongs to another \* \* \* after having been forbidden to do so \* \* \* by any owner, lessee, or custodian of the property or by any other authorized person. \* \* \*"

This measure was enacted and approved by the Governor, as an emergency measure on June 22, 1960, immediately subsequent to the incidents involved in these cases.

We refer to the criminal trespass statute chiefly to suggest some explanation of why the prosecutor attempted, without evidence, to convict petitioners of disturbing the peace. As a matter of law it is immaterial whether the evidence made out a criminal trespass. Petitioners were charged specifically with disturbing the peace in violation of L.S.A.-R.S. 14:103(7). Under the law of Louisiana and the United States Constitution, therefore, petitioners could not be lawfully convicted of some different offense. *State v. Morgan*, 204 La. 499, 15 So. 2d 866 (1943); *Cole v. Arkansas*, *supra*. Moreover, disturbing the peace was the only issue at trial. As this Court held in *Cole v. Arkansas* (333 U.S. at 201), "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

## II

THE STATUTE UNDER WHICH PETITIONERS WERE CONVICTED IS, IF APPLIED TO PETITIONERS, SO VAGUE AND UNCERTAIN AS TO VIOLATE DUE PROCESS

Since the Louisiana courts have final authority to interpret State legislation, it might have been permissible, as a matter of State law, for Louisiana to disregard the language of L.S.A.-R.S. 14:103 and its own prior decisions and reinterpret the statute to punish petitioners' peaceful conduct. If that be the significance of the decision below, there may be evidence to support the judgments, but the convictions fall upon another constitutional ground—the statute becomes so vague and indefinite that its enforcement denies

due process of law in violation of the Fourteenth Amendment.

**A. DUE PROCESS REQUIRES THAT A STATE STATUTE GIVE FAIR NOTICE OF WHAT CONDUCT IS CRIMINAL**

This Court has repeatedly held that a State statute violates the due process clause of the Fourteenth Amendment if it fails (i) to give fair notice of what acts it encompasses and (ii) to provide the trier with a sufficiently definite standard of guilt to avoid conviction on an *ad hoc* basis.' *E.g.*, *Lanetta v. New Jersey*, 306 U.S. 451; *Connally v. General Construction Co.*, 269 U.S. 385; *Musser v. Utah*, 333 U.S. 95, 97; *Winters v. New York*, 333 U.S. 507, 519. As this Court observed in *Connally* (269 U.S. at 391):

“ \* \* \* a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Similarly, in *Lanetta*, the Court defined the fair notice required by due process as (306 U.S. at 453):

“ \* \* \* No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. \* \* \* ”

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‘ It is possible that the requirement of clarity with respect to fair notice to defendants is not exactly equivalent to the requirement with respect to guidance for the State courts, because it may be assumed that the State judges are more competent to interpret a statute than are prospective defendants.

‘ *Nash v. United States*, 229 U.S. 373, is not to the contrary. There Mr. Justice Holmes said that “ \* \* \* the law is full of instances where a man's fate depends on his estimating rightly,

Thus, when a statute gives a defendant insufficient notice of the conduct prohibited, his conviction is invalid.

**B. SECTION 103(7) DID NOT GIVE FAIR NOTICE TO PETITIONERS  
THAT THEIR ACTIONS WERE ILLEGAL**

Section 103(7) has on its face several ambiguities. It is not entirely clear whether the prosecution must show an actual disturbance of the peace or only that such a disturbance is foreseeable (see *supra*, pp. 27-28); or whether subsection 103(7) prohibits unreasonable acts which cause a disturbance of the peace or acts which cause the public to act unreasonably. Furthermore, the meaning of "unreasonably" is not defined. Despite these difficulties, we assume *arguendo* that the statute is constitutional if it is construed as we have suggested, i.e., if it applies only to the acts specifically listed and other similar violent, loud, or boisterous conduct of the kind generally known to disturb the public order. It was only upon this reading that the Louisiana Supreme Court sustained the constitutionality of earlier but similar legislation. *State v. Sanford, supra*, 203 La. 961, 14 So. 2d 778.

The instant cases, however, do not involve an ordinary disturbance of the peace. *First*, all three cases involve racial discrimination. In our view, the facts

that is, as the jury subsequently estimates it, some matter of degree" (*id.* at 377). But this statement only illuminates the undisputed fact that "the Constitution does not require impossible standards"; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices \* \* \*'. *Roth v. United States*, 354 U.S. 476, 491.

clearly show that the State was itself promoting its own policy of racial discrimination (see *infra*, pp. 38-46), but even if this contention is not accepted, petitioners' arrest and conviction at the least have the effect of promoting private racial discrimination. In such circumstances, we submit that this Court should apply a strict standard in determining whether a statute is unconstitutionally vague. For a vague statute provides all too easy means by which a State can impose *ad hoc* criminal penalties in order to promote racial discrimination. *Winters v. New York*, 333 U.S. 507, 509-510, 517, indicates that the degree of certainty required for due process is particularly strict in the delicate area of freedom of expression; otherwise, the Court said, expression which is constitutionally protected would be effectively prohibited by the very vagueness of the law. See also *Smith v. California*, 361 U.S. 147, 151. Similar considerations call for a strict standard of constitutional certainty in any statute applied to support racial discrimination.

Second, there is not a word in L.S.A.-R.S. 14:103 which suggests that it prohibits sitting quietly at a lunch counter, in a store into which one has been invited by the proprietor, and asking for service despite the proprietor's previous policy of racial segregation. Nor is there any warning that staying there peacefully after service has been refused becomes criminal. Petitioners' conduct caused no disturbance; there was no reason to foresee a disturbance. If the statute applies to these facts, it can be used to convict anyone for any conduct that the local officials, acting *ad hoc*, find distasteful.

Interpretation of a State statute prior to the defendant's conduct may sometimes clarify otherwise indefinite language sufficiently to satisfy the requirements of fair notice. See *e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574; *International Harvester Co. v. Kentucky*, 234 U.S. 216. Here, however, the latest decision of the Louisiana Supreme Court on this subject interpreted the predecessor disturbance-of-the-peace statute (one which, unlike the statute involved in this case, clearly did not require proof of an actual disturbance (see *supra*, pp. 28-29)) so as not to apply to peaceful activities. *State v. Sanford*, *supra*. The Louisiana court interpreted the statute in this manner partially because (203 La. at 970):

\* \* \* to construe and apply the statute in the way the district judge did would seriously involve its validity under our State Constitution, because it is well-settled that no act or conduct however reprehensible, is a crime in Louisiana, unless it is defined and made a crime clearly and unmistakably by statute.\* \* \*

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\* The Louisiana Supreme Court has repeatedly recognized that under its own constitution fair notice is an element of due process. See, *e.g.*, *State v. Christine*, 239 La. 259, 118 So. 2d 403 (1960); *State v. Sanford*, *supra*; *State v. Kraft*, 214 La. 251, 37 So. 2d 515 (1948). In *State v. Kraft*, *supra*, the court explained the requirement of certainty (214 La. at 256):

\* \* \* It is sufficient to say that a criminal statute, in order to be valid and enforceable, must define the offense so specifically or accurately that any reader having ordinary intelligence will know when or whether his conduct is on the one side or the other side of the harder line between that which is and that which is not denounced as an offense against the law."

The per curiam decisions of the Louisiana Supreme Court in the instant cases are directly contrary to the *Sanford* case since here the court applied Section 103 to completely peaceful activity. Thus, petitioners were not given fair notice that their conduct was criminal either by the terms of the statute or by its interpretation in the Louisiana courts.

### III

**UNDER THE CIRCUMSTANCES OF THESE CASES, PETITIONERS' ARREST AND CONVICTION WERE THE RESULT OF STATE, NOT PRIVATELY, IMPOSED RACIAL DISCRIMINATION AND THEREFORE VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT**

As we have shown above (pp. 18-33), the records in these cases are devoid of evidence which could sustain a conviction for disturbing the peace. But despite this lack of evidence of any violation of L.S.A.-R.S. 14:103(7), petitioners were arrested and convicted. Under the circumstances of these cases, it seems plain that the arrests and convictions were simply attempts to effectuate a State policy of racial segregation which violates the equal protection clause of the Fourteenth Amendment."

"The Louisiana State policy of racial segregation is indicated by a multitude of legislation. In 1960, the legislature passed a joint resolution which began (Act No. 630 of 1960):

"Whereas, Louisiana has always maintained a policy of segregation of the races, and

"Whereas, it is the intention of the citizens of this sovereign state that such a policy be continued. \* \* \*

There are statutes in Louisiana which require segregated seating on trains (L.S.A.-R.S. 45:526-528), and in railroad waiting rooms (L.S.A.-R.S. 45:522-525); which specify that court dockets shall reflect the race of the parties in divorce cases (L.S.A.-R.S. 13:917); which compel segregation in penal

In contending that petitioners' arrest and conviction were a denial of equal protection of the law, we do not rely on the obvious fact that since petitioners were considered both by the restaurants and the police to be sitting in the wrong place merely because they were Negroes, their arrest and conviction depended on their race. While petitioners argue that this enforcement of local custom constitutes racial discrimination enforced by State action within the meaning of the Fourteenth Amendment, (Pet. Br. 18-24), we do not consider it necessary to reach this "broad" contention (see *supra*, pp. 16-17). For here petitioners' arrest and conviction were the result of the State's own policy of racial discrimination even though it happened to be combined with privately imposed discrimination. The State was not merely allowing a private person to carry out private discrimination on his own property or even enforcing such discrimination. Acting through local police and judicial authority, it imposed a policy of its own.

A. The records show that petitioners were arrested because of their "mere presence" at the lunch counters. The police officers acted, not to curb a disturbance of the peace but to carry out what they

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institutions (L.S.A.-R.S. 15:752); which prohibit persons of one race from establishing residence within a "community" of the other race without approval of a majority of the residents of the other race (L.S.A.-R.S. 33:5066); which require segregated box offices for circuses (L.S.A.-R.S. 4:5) and which prohibit the arrangement of dances, athletic contests, etc., where Negroes and whites will be present together (L.S.A.-R.S. 4:451-455). Even the blind are segregated under Louisiana law (L.S.A.-R.S. 17:10). In these very cases each petitioners' race was indicated on the information (see *supra*, p. 6, note 2).

considered to be the State policy of racial segregation. The *Garner* case shows this most clearly, for there the owner, while advising petitioners that they would not be served, did not order them to leave and neither he nor any of his employees or customers called the police (G. 30-31). Rather, the police officers who made the arrest were called by a police officer on his beat near the store (G. 34-35). Thus, the arrival and subsequent actions of the police were entirely unsolicited by any private citizen. The only police officer who testified at petitioners' trial stated that the police acted because " \* \* \* the law says that this place was reserved for white people and only white people can sit there and that was the reason they were arrested. \* \* \*. The fact that they were sitting there and in my opinion were disturbing the peace by their mere presence of being there I think was a violation of Act 103. \* \* \*. The mere presence of these negro defendants sitting at this cafe counter seat reserved for white folks was violating the law \* \* \*" (G. 35-36).

Thus, the police officers' action was not in any way directed at protecting the property rights of the owner of the drug store. Plainly, this direct, unsolicited, and affirmative action of the police represents a form of State action designed to effectuate a State policy of racial segregation. That action is as clearly unconstitutional as if it had been taken under a statute specifically requiring the segregation of the races. In the words of Mr. Justice

Frankfurter, dissenting on other grounds in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 727:

\* \* \* For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment. \* \* \*

Concededly, the role of the State in *Briscoe* and *Hoston* is not quite as independent of private action as it is in *Garner*. In *Briscoe*, the police were called by a patron, a Greyhound bus driver (B. 33), and in *Hoston*, the police were summoned by the store manager (H. 30). But in neither case were the police told that their assistance was needed for any reason other than that Negroes were sitting at a lunch counter reserved for whites. In *Briscoe*, the call to the police advised that "there were several colored people sitting at the lunch counter. \* \* \* [The police] were called because of the fact that [petitioners] were sitting in a section reserved for white people" (B. 34-35). In *Hoston*, the police were told that "they [the Negroes] were seated at the counter reserved for whites" (H. 30). There is no evidence that either the bus driver or the store manager summoned the police because petitioners refused to leave upon request." Thus, in both *Briscoe* and *Hoston* the calls to the police did no

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<sup>22</sup> In any event, it is hardly likely that a request to move would have provided any greater justification for the arrests in these cases. A refusal to move is not an element of the crime for which these petitioners were arrested and convicted.

more than bring to the officers' attention what they observed for themselves in *Garner*.

There was no evidence that the police were requested to arrest petitioners.<sup>12</sup> The arrests in the other cases were made by the same officers who acted in *Garner*, and for the same reasons. Thus, in *Briscoe*, the police officer who testified in *Garner* stated that "the mere presence of their being there" was the reason for petitioners' arrest (B. 38). "[A]c-  
cording to the law, in my opinion, they were disturbing the peace. \* \* \* The fact that their presence was there in the section reserved for white people, I felt that they were disturbing the peace of the community" (B. 36). Similarly, in *Hoston*, the same officer testified that petitioners were disturbing the peace "[b]y sitting there" "because that place was reserved for white people" (H. 37). Whether the police acted of their own volition or in response to a call in no way affects the fact that these arrests ostensibly for disturbing the peace, but actually based on petitioners' mere presence, were but a means of enforcing a State policy of racial segregation.

B. It is also clear that petitioners' conviction was based on their race, and for this independent reason is a denial of equal protection of the laws. As we have shown above (pp. 23-30), the prosecution introduced no evidence upon essential elements of the statutory offense: upon whether a disturbance was

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<sup>12</sup> In *Briscoe*, a waitress did testify that, when the police were called, they were asked "to come get them" (R. 31). Since the bus driver made the call, it was apparently he who made this request. There is no evidence that he, or the waitress, had authority to have petitioners removed from the restaurant.

foreseeable and whether a disturbance occurred. The only possible basis upon which the court could have found that these elements of the crime were satisfied is judicial notice or a ruling that the existence of the necessary elements involves a question of law rather than of fact.

1. The trial court found in all three cases that petitioners' actions would foreseeably alarm and disturb the public (see *supra*, p. 23). Since no evidence was introduced to support this conclusion, it necessarily must have depended upon the court's taking judicial notice that, if Negroes publicly occupy facilities reserved for whites, public alarm or disturbance will foreseeably occur. As stated above (pp. 25-26), we do not believe the courts may take judicial notice of facts which are doubtful and, particularly, as in these cases, where they are contradicted by the record. While this is true generally, it is the more important when the effect is to impose racial discrimination. If the Louisiana courts can properly take judicial notice that a disturbance of the peace is foreseeable as a matter of law, without proof, whenever racial integration occurs in public places, the result is a State-imposed or, at the least, strongly encouraged, rule of segregation. As Mr. Justice Stewart stated in his concurring opinion in *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. at 726-727:

\* \* \* In upholding Eagle's [a restaurant] right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which

permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers \* \* \*." *There is no suggestion in the record that the appellant as an individual was such a person.* The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment. \* \* \* [Emphasis added.]

2. The trial court found that a disturbance had actually occurred only in the *Garner* case. While there is no evidence to support this determination, a court could not properly take judicial notice that a disturbance in fact occurs whenever Negroes publicly enter places reserved for whites. But even if an assumption so contrary to common experience were generally permissible in criminal cases, it could not be permitted when it would impose racial discrimination. Thus, just as a State cannot take judicial notice that a disturbance is foreseeable when whites and Negroes occupy the same public facilities (*supra*, pp. 25-26), similarly it violates the equal protection clause of the Fourteenth Amendment to take judicial notice that disturbances actually occur in every such situation.

3. The trial court found in the *Garner* and *Briscoe* cases, although not in the *Hoston* case, that petitioners acted unreasonably (G. 37; B. 39). This determination, which is required by subsection 7, cannot be based on any evidence directly on the point, since none was introduced; therefore, it must

have been based on a conclusion of law. This means that the court concluded that it is automatically "unreasonable" for Negroes to sit in private facilities reserved for whites even though they are not told by the proprietor to leave the premises or even the particular facility. This determination by the State would mean here again that the State was itself engaged in imposing racial segregation. Just as a State cannot consider Negroes automatically "offensive" to white customers of a restaurant in the absence of proof, so a State cannot consider Negroes *ipso facto* unreasonable when they sit at lunch counters normally reserved for whites (see the concurring opinion of Mr. Justice Stewart in *Burton v. Wilmington Parking Authority*, quoted *supra*, pp. 43-44).

C. While Louisiana's disturbance-of-the-peace statute was undoubtedly not enacted to discriminate against Negroes, it is nevertheless unconstitutional when applied so as to justify the arrest and conviction of Negroes as part of a State-imposed policy of segregation. As long ago as 1886, this Court held in *Yick Wo v. Hopkins*, 118 U.S. 356, 373:

\* \* \* whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. \* \* \*

Similarly, in *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352, this Court held:

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. \* \* \*

When the execution of a law is based upon racial considerations, there is a clear violation of the Fourteenth Amendment. This principal was succinctly stated by Mrs. Justice Harlan, dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 554-559:

Our Constitution is color-blind \* \* \*. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. \* \* \*

Race can never be made a factor in law enforcement without denying equal protection. State action which promotes a State policy of segregation and, therefore, violates rights protected by the Constitution is not saved by using the label "disturbance of the peace."

#### IV

**IN *BRISCOE V. LOUISIANA*, PETITIONERS' ARREST AND CONVICTION VIOLATED THE INTERSTATE COMMERCE ACT**

**A. THE INTERSTATE COMMERCE ACT PROHIBITS DISCRIMINATION BASED ON RACE IN INTERSTATE BUS TERMINALS**

Section 216(d) of Part II of the Interstate Commerce Act, 49 U.S.C. 316(d), provides that:

<sup>12</sup> See Note, *The Right To Nondiscriminatory Enforcement of State Penal Laws*, 61 Col. L. Rev. 1108 (1961).

\* \* \* It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person \* \* \* in any respect whatsoever; or to subject any particular person \* \* \* to any unjust discrimination or unreasonable prejudice or disadvantage in any respect whatsoever \* \* \*.

In *Boynton v. Virginia*, 364 U.S. 454, the Court held that this provision forbids racial discrimination against interstate passengers in terminals and restaurants operated "as an integral part of the bus carrier's transportation service for interstate passenger" (*id.* at 463-464). Since "[t]he Interstate Commerce Act \* \* \* uses language of the broadest type to bar discriminators of all kinds" (*id.* at 457), we submit that none of the differences between the instant case and *Boynton* justifies different results.

Petitioners in the instant case were students in Baton Rouge and were therefore apparently not interstate passengers. This Court, however, did not rely in *Boynton* upon the status of the defendant as an interstate passenger. For whether the customer himself was an interstate passenger is irrelevant under 49 U.S.C. 316(d); that section forbids interstate carriers to discriminate against "*any particular person*" (emphasis added).<sup>14</sup> The only way the 'restau-

<sup>14</sup> The power of Congress to prevent discrimination of all kinds in interstate terminals is beyond doubt. This Court has held that even if "activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard v. Filburn*, 317 U.S. 111, 125.

rant could distinguish between Negro interstate passengers and intrastate passengers or non-passengers would be to require Negro customers to demonstrate their interstate status before they use the facilities open to interstate passengers without discrimination. White customers would not be required to do so since the restaurant open to white intrastate passengers and non-passengers is the same for white interstate passengers. Thus, if the restaurant in this case could refuse admission to Negroes other than interstate passengers, the effect would be to discriminate against Negro interstate passengers vis-à-vis white interstate passengers by requiring only the former to show their tickets. See *Baldwin v. Morgan*, 287 F. 2d 750, 759 (C.A. 5).

The lunch counter involved in *Briscoe* was located in the Greyhound Restaurant in the Greyhound bus terminal in Baton Rouge. The information charged petitioners with refusing "to move from a cafe counter seat at Greyhound Restaurant \* \* \*" (B. 1); the waitress who refused service to petitioners testified that she was employed at the "Greyhound Bus Station" (B. 30); and one of several bus drivers in the restaurant called the police (B. 33). This Court could properly take judicial notice that the Greyhound Company is an interstate motor carrier and that the Baton Rouge station is an interstate terminal. It can fairly be inferred, in the absence of evidence to the contrary, that a restaurant called the Greyhound Restaurant located in a Greyhound Sta-

tion is operated as an integral part of interstate commerce. In these circumstances, the *Boynton* case holds that the Interstate Commerce Act prohibits racial discrimination.

**B. THIS CONTENTION CAN PROPERLY BE CONSIDERED BY THIS COURT  
EVEN THOUGH PETITIONERS HAVE NOT PRESENTED IT**

Petitioners in the Louisiana courts, as in this Court, have raised only constitutional questions and have not argued that their rights under the Interstate Commerce Act were violated. Nevertheless, we submit that this issue can be considered by this Court. Just as in *Boynton v. Virginia*, *supra*, where the petitioner did not raise this issue in his petition for certiorari and before the state courts argued only a "closely related" issue, there are here "persuasive reasons . . . why this case should be decided, if it can, on the Interstate Commerce Act contention . . . ." (364 U.S. at 457).

We submit that this Court cannot be forced to consider constitutional issues merely because the petitioners in *Briscoe* failed to raise their statutory arguments. The Court will necessarily decide one or more constitutional issues in the *Garner* and *Hoston* cases for in those cases the lunch counters were not located in bus terminals and therefore the contention under the Interstate Commerce Act is not available. But if the Court decides that the arrest and conviction of the petitioners in *Garner* and *Hoston* is invalid on the basis of a particular constitutional contention, but decides (contrary to our arguments above) that this contention does not apply to

the petitioners in *Briscoe* because of the particular facts of that case, the Court should not be required to decide for or against the petitioners in *Briscoe* under the various other constitutional contentions. It seems entirely appropriate for the Court, before going on to the other constitutional issues, to determine whether petitioners' statutory rights under the Interstate Commerce Act have been violated.

Unless the Court can consider statutory issues despite the failure of the parties to raise them, the parties have the power to force the Court to decide constitutional issues even though there is a dispositive non-constitutional issue. This would allow the parties to nullify this Court's historic refusal to adjudicate constitutional questions except where such an adjudication is absolutely necessary to the decision. See the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348. In particular, this Court has held that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Id.* at 347; *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 191; *Light v. United States*, 220 U.S. 523, 538.

In circumstances similar to those involved here, this Court in *United States v. C.I.O.*, 335 U.S. 106, 110, refused to consider the constitutional issues. There, the defendants challenged the Federal Corrupt Practices Act and the indictment under it on several constitutional grounds but raised no claim in the trial

court that the indictment failed to charge an offense within the scope of the statute (see R. 7-13 in No. 695, Oct. Term 1947). Moreover, only the constitutional issues were raised in this Court. Nevertheless, the Court stated that it passes on the constitutionality of statutes only "in cases of logical necessity," which it found was not present because the indictment did not charge an offense. Thus, even though the parties had raised only constitutional issues, the Court concluded that a non-constitutional issue was dispositive and refused to consider the constitutional questions.

We submit that, if the constitutional issue which is conclusive for petitioners in *Garner* and *Hoston* is not found to be conclusive for petitioners in *Briscoe*, the Court may and should consider the non-constitutional question whether the latters' rights under the Interstate Commerce Act were violated. Since, we believe, petitioners' rights under the Act were in fact violated, the Court will thereby be relieved of deciding any further constitutional issues.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the Supreme Court of Louisiana should be reversed.

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